SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
APR 12 1965
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 914

MATT M. KOTULA, d/b/a Albany Motor Sales,
Petitioner,

vs.

FORD MOTOR COMPANY,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

R. J. LEONARD
Attorney for Respondent
1000 First National Bank Building
St. Paul, Minnesota 55101

Of Counsel:
WRIGHT TISDALE
R. B. DARRAGH
J. MICHAEL GUENTHER
FORD MOTOR COMPANY

CApital 2-2701 — Review Publishing Co., 141 E. 5th St., St. Paul 1, Minn. — CApital 2-2701

SUBJECT INDEX

	Page
Counter-Statement of the Case	1
Argument	10
The decision of the Court of Appeals, affirming on the particular facts of this case a Judgment for Respondent notwithstanding the verdict, is proper and does not merit review by this Cort	10
The decision of the Court of Appeals does not impose a new construction of the Act	13
Conclusion	14

AUTHORITIES

Cases:	Page
Appalachian Power Co. v. American Institute of Certified Public Accountants, 89 S. Ct. 16 (1959)	11
Augusta Rambler Sales, Inc. v. American Motor Sales Corp., 213 F. Supp. 889 (N.D. Ga. 1963)	12
Baltimore & C. Line v. Redman, 295 U.S. 654 (1935)	10
Blenke Bros. v. Chrysler Corp., 189 F. Supp. 420 (N.D. Ill. 1960)	12
Brunet v. S. S. Kresge Co., 115 F. 2d 713 (7th Cir. 1940)	10
Coughran v. Bigelow, 164 U.S. 301 (1896)	10
Galloway v. United States, 319 U.S. 372 (1943)	10
Garvin v. American Motors Sales Corp., 318 F. 2d 518 (3d Cir. 1963)	12
Globe Motors, Inc. v. Studebaker-Packard Corp., 328 F. 2d 645 (3d Cir. 1964)	12

PAGE

Leach v. Ford Motor Co.,
189 F. Supp. 349 (N.D. Cal. 1960) 12

Manaia v. Potomac Elec. Power Co.,
268 F. 2d 793 (7th Cir. 1959) 10

Milos v. Ford Motor Co.,
317 F. 2d 712 (3d Cir. 1962) 12

Pierce Ford Sales v. Ford Motor Co.,
299 F. 2d 425 (2d Cir. 1962) 11, 12

Pinney & Topliff v. Chrysler Corp.,
176 F. Supp. 801 (S.D. Cal. 1959) 12

Staten Island Motors, Inc. v. American Motors
Sales Corp., 169 F. Supp. 378 (D. N.J. 1959)..... 12

Woodward v. General Motors Corp.,
298 F. 2d 121 (5th Cir. 1962) 11, 12

Statutes:

Automobile Dealers Franchise Act,
70 Stat. 1125, 15 U.S.C. § 1221-1225 (1956) 11

Miscellaneous:

H. R. Rep. 2850, 84th Cong. 2d Sess.,
3 U.S. Code, Cong. & Admin. News 4596 (1956)... 12

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. .....

MATT M. KOTULA, d/b/a Albany Motor Sales,
Petitioner,

vs.

FORD MOTOR COMPANY,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

COUNTER-STATEMENT OF THE CASE

Since both the District Court and the Court of Appeals are in agreement as to the basic facts in this case, a brief counter-statement here should suffice (District Court order, R. 466; Court of Appeals opinion, P. 25).*

Matt Kotula, doing business as Albany Motor Sales, was appointed in 1947 as the authorized Ford dealer in Albany, Minnesota and the surrounding area. Both Chevrolet and Plymouth also were represented by authorized dealers in this market.

The most recent Ford Sales Agreement between Mr. Kotula and respondent, and the one that is relevant here, was exe-

*References to the Petition for Certiorari are by page number following a P., such as (P. 15). References to the record are by page number following an R., such as (R. 15).

cuted on April 1, 1957. It was to continue in effect until terminated by either party. The following provisions of that Agreement are particularly material:

"2. (a) Sales and Service Responsibility.

(i) Sales. The Dealer shall promote vigorously and aggressively the sale of VEHICLES at retail, and the sale of other COMPANY PRODUCTS, in the DEALER'S LOCALITY, making use to the greatest reasonable extent of the Company's advertising and sales promotions and merchandising material, and shall develop energetically and satisfactorily the potentiality for such sales and obtain a reasonable share thereof; but the Dealer shall not be limited to the DEALER'S LOCALITY in making sales. Whether or not the Dealer shall have vigorously and aggressively promoted such sales in the DEALER'S LOCALITY and shall have energetically and satisfactorily developed the potentiality for such sales and obtained a reasonable portion thereof, shall be determined by reference to such reasonable criteria as the Company may develop from time to time including, without limitation, in the case of VEHICLES (1) the relationship of the Dealer's retail sales of VEHICLES to users located in the DEALER'S LOCALITY to (a) the total registrations of VEHICLES in such locality, (b) the fair and reasonable retail sales objectives of VEHICLES established for the Dealer for such locality, and (c) the registrations of automobiles (or trucks) of other manufacturers selected by the Company and generally competitive with VEHICLES in price and product characteristics * * * and (2) comparison of each of the relationships referred to in the foregoing clause (1) with (a) similar relationships with respect to each of not less than three (3) other authorized Ford dealers of reasonably comparable

size located in the nearest areas of sales and service responsibility reasonably comparable to the DEALER'S LOCALITY, and (b) similar relationships with respect to the average of all authorized Ford dealers as a group in one or more of the following areas: The Company's zone sales area in which the Dealer is located; the Company's district sales area in which the Dealer is located; the Company's regional sales area in which the Dealer is located; and the national sales area. * * *"

"17. (a) Termination

(1) The Company may terminate by notice given to the Dealer not less than ninety (90) days prior to the effective date of such notice in the event the Dealer shall have failed to fulfill or perform any one or more of the duties, obligations or responsibilities undertaken by him pursuant to paragraph 2. * * *"

During the years from 1957 through 1961, Mr. Kotula consistently failed to perform his obligations under paragraph 2(a) of the Agreement as measured by the criteria set forth therein. The monthly sales objectives assigned to him were based upon the same source data and were computed in the same manner as for all Ford dealers (R. 259). His percentage of accomplishment, however, was far below that of all Ford dealers in his Zone (comprising 21 Ford dealers in the same geographic area). It was also far below the average accomplishment of all Ford dealers in the Twin Cities District (comprising 325 Ford dealers) (R. 259-60). The following data depicts Kotula's and other Ford dealers' performance against their sales objectives:

Sales as a Percentage of Objectives (Cars)

(R. 259-60)

	1957	*1958*	*1959*	*1960*	*1961*
Kotula	38.3%	30.6%	43.4%	37.1%	41.7%
Zone J. (21 dealers)	99.4	81.6	136.2	128.5	99.5
District (325 dealers)	100.9	91.7	111.9	80.8	90.0

Ford's competitive representation against Chevrolet in the Albany market area, as measured by new car registrations there, also was well below the average in the Zone and the District. The following data depicts performance of Mr. Kotula and other Ford dealers, in terms of registration penetration:

Ford Registrations as a Percentage of Chevrolet Registrations (Cars)

(R. 262-63)

	1957	*1958*	*1959*	*1960*	*1961*
Albany, Minnesota	55.9%	45.8%	94.9%	37.0%	55.0%
Zone J.	100.4	93.4	114.5	76.5	87.1
District	107.2	87.5	111.9	80.8	80.3

This substandard record of performance was further magnified by the fact that Mr. Kotula had been unable to compete successfully even for the Ford sales in the Albany market area. The following data revealed that Ford dealers located elsewhere had sold a substantial number of Fords registered in Albany.

	1957	*1958*	*1959*	*1960*	*1961*
Sales made by Kotula to residents of the Albany trade area (R. 90)	13	10	22	13	11
Total Sales by Kotula (R. 379)	18	15	23	13	15

New Fords Registered in Albany trade area (R. 379)	33	22	37	17	22	

From these figures, the following percentages are obtained:

	1957	*1958*	*1959*	*1960*	*1961*	*Average*
Total sales of Kotula (including sales to non-residents of Albany) as a percent of all Fords registered in Albany	55%	68%	62%	76%	68%	65.9%
Percent of Fords registered in the Albany area which were sold by Kotula	39%	45%	39%	76%	68%	54.8%

Further evidence of his non-performance and the limited value of the franchise to petitioner is disclosed by his income as set forth by the Court of Appeals in its opinion. 338 F. 2d at 737.

Personnel for Ford's Twin Cities District Sales Office called on Mr. Kotula from time to time to review his sales and market penetration performance (R. 32-32). They also made recommendations and suggestions designed to assist him to improve his operation and increase his income. For example, they suggested that he discontinue leaving the dealership unattended for several hours each day while driving a school bus; they recommended that he employ a salesman and a mechanic; they suggested that he consider adopting a more competitive wholesale financing plan. For reasons of his

own, however, Mr. Kotula refused to follow these recommendations (R. 145). His performance continued at a substandard level (R. 256-57).

Eventually, in June of 1961, the management of Twin Cities District Sales Office concluded that Mr. Kotula had failed to perform satisfactorily his obligations under paragraph 2(a) of the Sales Agreement, and that no substantial improvement could reasonably be anticipated (R. 358). District Management then determined to recommend termination of his Agreement.

Mr. Kotula's Sales Agreement provided that only an officer of Ford Motor Company (hereinafter sometimes referred to as "Ford" or the "Company") was authorized to terminate on the Company's behalf. Under Ford procedures, District Office management could only recommend termination to the next level of sales management—the Regional Sales Manager (R. 221-23). The Twin Cities District Office management, therefore, recommended to Ford's Midwest Regional Sales Manager that Mr. Kotula's Sales Agreement be terminated pursuant to Paragraph 17(a)(1) of the Sales Agreement. In accordance with established Ford procedures, a file containing statistical performance data relating to Paragraph 2(a) and copies of dealer contact reports was assembled and submitted with the recommendation (R. 238).

Ford's Midwest Regional management then reviewed the recommendation, together with the accompanying file (R. 305). Particular attention was given to the performance data relating to paragraph 2(a) (R. 305). A personal conference also was held with Mr. Kotula, but disclosed no special circumstance or other explanation of his substandard sales and performance record (R. 306-11). Regional management then concluded that termination was warranted

and forwarded the recommendation with its own concurrence to the General Sales Office of Ford Division in Dearborn, Michigan (R. 310).

The General Sales Office reviewed the recommendation, again with special attention to the performance data relating to the criteria of paragraph 2(a) (R. 321). After concluding that termination for unsatisfactory sales performance was in order, the Division authorized the Office of the Secretary of the Company to issue a Notice of Termination to Mr. Kotula (R. 321). This notice was sent on November 10, 1961 (R. 321).

Upon receipt of the Notice, Mr. Kotula exercised the right, set forth in the Notice itself, to appeal to the Company's Dealer Policy Board, also located in Dearborn. This Board had been established in 1956, with Benson Ford as Vice-President and Chairman. It has no sales responsibility, and reports only to the Board of Directors of the Company. Among other things, it is empowered to review and to confirm or rescind dealer terminations (R. 366-67).

The Dealer Policy Board accorded Mr. Kotula a hearing. He conferred with the Board and complained that the statistical data compiled to evaluate his performance was based, at least in part, upon inaccurate Chevrolet registration data. He also insisted that the Ford Twin Cities District management was attempting to punish him for an alleged refusal to purchase a truck in May of 1959 (R. 374-75).

The Board reviewed the sales performance of Mr. Kotula and also investigated each of his contentions. In particular, it directed the preparation of a study of *each Chevrolet registered* in the Albany market area over the preceding several years (R. 376). The Board then analyzed all the information and data that had been assembled (R. 377-78). It determined

that even after elimination of all doubtful Chevrolet data, Mr. Kotula's sales and market penetration performance nevertheless had been totally unsatisfactory (R. 365-79). It concluded to confirm the Notice, and so informed Mr. Kotula by letter of February 23, 1962, together with a statement of its reasons for so doing (R. 380). Termination became effective ninety (90) days later, in May of 1962.

In purporting to recite the facts, the Petition presents an inflammatory and completely distorted version of the case. Thus, the Petition relates evidence of claimed personal animosity, fabricated documents and unquestioning reliance by Company officials on alleged false representations of local sales personnel- all as if this evidence represented the true facts and was uncontroverted. The facts are that all such evidence was vigorously disputed and completely controverted by the Respondent.

Each of Mr. Kotula's claimed version of events and conduct of Company personnel toward him was controverted at the trial, in most instances by the Company employees personally involved. In addition, most of the statistical information submitted at the trial was obtained from independent sources or from Mr. Kotula himself. Ford personnel did no more than compile the data.

There is no dispute that, for present purposes, the verdict of the jury must be taken to have resolved conflicting evidence in Petitioner's favor. But that verdict does not warrant distortion of the evidence in the manner presented in the Petion. Nor does it serve to transform mere speculation into probative evidence.

Respondent does not here propose to challenge each misleading or distorted statement contained in the Petition. Reference to typical examples will suffice. For example, on

the issue of fabricated documents, Petitioner refers to a typewritten report dated in 1959 but prepared on a form that was not printed until 1960. He makes no reference, however, to testimony that a *handwritten* report, identical in every respect, had in fact been submitted in 1959 (R. 332). Other testimony, also unmentioned in the Petition, offered a convincing explanation of this insignificant irregularity.* Concerning the review given by the Dealer Policy Board, Petioner states that the Board simply referred the matter to the District Office and accepted the District's statements without independent investigation (P. 10). Detailed testimony in the record (R. 367-81) concerning the elaborate investigation and review made by the Board, however, illustrates the complete falsity of Petitioner's statement.

Petitioner's twisted account of the evidence is further refuted by the decisions of the courts below. The District Court and the Court of Appeals considered carefully all the evidence in the record. It is inconceivable that either court would have reached the conclusion it did were there any basis in the evidence for the version of the facts set forth in the Petition.

---

*Respondent's witness A. Spindler testified that a dealer termination file must be submitted in quintuplicate. If there are not five (5) copies of a given report and it is not a lengthy one, it would be typed on a new form rather than be duplicated on a duplicating or mimeographing machine (R. 323).

ARGUMENT

1. The decision of the Court of Appeals, affirming on the particular facts of this case a judgment for Respondent notwithstanding the verdict, is proper and does not merit review by this Court.

Petitioner's principal contention, to which he devotes almost all of his argument, is that there was sufficient evidence to support the verdict of the jury. He urges that the decision of the Court of Appeals affirming judgment notwithstanding the verdict has deprived him of his right to trial by jury. He seeks review by this Court on that ground. This contention is without substance or merit, however, and in no event does it offer sufficient reason for this Court to grant review.

It is fundamental that the granting of a Motion pursuant to Rule 50 of the Federal Rules of Civil Procedure for judgment notwithstanding the verdict does not violate the Seventh Amendment to the Constitution where the verdict is not supported by substantial evidence. *Galloway v. United States*, 319 U.S. 372 (1943), *rehearing denied*, 320 U.S. 214 (1943). See also *Baltimore & C. Line v. Redman*, 295 U.S. 654 (1935); *Coughran v. Bigelow*, 164 U.S. 301 (1896); *Manaia v. Potomac Electric Power Co.*, 268 F. 2d 793 (7th Cir. 1959), *cert. denied*, 361 U.S. 913 (1959); *Brunet v. S. S. Kresge Co.*, 115 F. 2d 713 (7th Cir. 1940), *cert. denied*, 313 U.S. 577 (1941).

Contrary to the contention in the Petition, the actions of the courts below, both in entering and in affirming a judgment for Respondent, do not present a constitutional question. Neither court reweighed the evidence. Each simply determine that the record did not contain substantial evidence supporting the verdict. *Galloway v. United States, supra.* The

interpretation of this record urged in the Petition is based upon conjecture and speculation rather than fact. The same argument was made in both lower courts. Petitioner clearly has had his day in court.

Moreover, the decision of the Court of Appeals was based upon the particular facts of this case. As such, it is not the type of decision that merits review by this Court. As Justice Brennan said (In Chambers) in *Appalachian Power Co. v. American Institute of Certified Public Accountants*, 4 L. Ed. 2d 30, 32, 80 S. Ct. 16 (1959):

> But ordinarily an application by a District Court of the Rules of Civil Procedure when affirmed by the Court of Appeals will not be reviewed by this Court. This is particularly true where, as here, the question is one that concerns the judgment of the District Judge in relation to a particular set of facts.

There is nothing unique or novel about this case to justify a departure from the general principles governing review by this Court.

Petitioner brought this action under the provisions of the Automobile Dealers Franchise Act. 70 Stat. 1125, 15 U.S.C. §1221-1225 (1956). The jurisdiction of the District Court, as well as the claim for damages, was based solely upon the allegation that termination of Kotula's Sales Agreement had been violative of that Act.

Three different Courts of Appeal have interpreted the Act to condition recovery upon proof of coercion or intimidation. There has been no conflict among the Courts of Appeal over this interpretation. See e.g., *Woodward v. General Motors Corp.*, 298 F. 2d 121 (5th Cir. 1962), *cert. denied*, 369 U.S. 887 (1962), *rehearing denied*, 370 U.S. 965 (1962); *Pierce Ford Sales v. Ford Motor Company*, 299 F. 2d 425 (2d Cir.

1962), *cert denied*, 371 U.S. 829 (1962); *Milos v. Ford Motor Co.*, 317 F. 2d 712 (3d Cir. 1962), *cert. denied*, 375 U.S. 896 (1963). Other courts uniformly have adopted this view. *Globe Motors, Inc. v. Studebaker-Packard Corp.*, 328 F. 2d 645 (3d Cir. 1964); *Garvin v. American Motors Sales Corp.*, 318 F. 2d 518 (3d Cir. 1963); *Augusta Rambler Sales, Inc. v. American Motor Sales Corp.*, 213 F. Supp. 889 (N.D. Ga. 1963); *Leach v. Ford Motor Co.*, 189 F. Supp. 349 (N.D. Cal. 1960); *Blenke Bros. v. Chrysler Corp.*, 189 F. Supp. 420 (N.D. Ill. 1960); *Pinney & Topliff v. Chrysler Corp.*, 176 F. Supp. 801 (S.D. Cal. 1959); *Staten Island Motors, Inc. v. American Motors Sales Corp.*, 169 F. Supp. 378 (D. N.J. 1959).

It also is undisputed that the Act does not prohibit or curtail the right of a manufacturer to terminate a dealer who has failed to provide satisfactory representation H.R. Rep. 2850, 84th Cong., 2d Sess., 3 U.S. Code, Cong. & Admin. News 4596 (1956); *Woodward v. General Motors, supra*; *Milos v. Ford Motor Company, supra*. As shown by the cases cited in the preceding paragraph, termination of a dealer's sales agreement for failure to perform his obligations does not amount to coercion and intimidation under the Act and does not give rise to a cause of action under it.

Finally, this Court consistently has denied petitions for certiorari to review decisions construing the Act, *Woodward v. General Motors, Corp., supra*; *Pierce Ford Sales, Inc. v. Ford Motor Co., supra*; *Milos v. Ford Motor Co., supra*. Nothing is presented here that should lead the Court to grant the petition in this case.

Termination of Mr. Kotula's Sales Agreement was based upon his substandard sales and market penetration performance, as both courts below clearly found. There is no dispute in the record that he failed to accomplish his sales objectives,

or that his performance against the criteria set forth in paragraph 2(a) of the Sales Agreement was unsatisfactory. The decision to terminate was made only after careful deliberation by several levels of Ford management. The Notice of Termination was confirmed only after Ford's Dealer Policy Board had caused an exhaustive investigation of Petitioner's contentions. The Board concluded that Petitioner had failed to perform satisfactory in accordance with paragraph 2(a) of the Sales Agreement and confirmed the Notice on that ground.

There is simply no evidence in the record in this case which related the isolated incident concerning the purchase of one truck in 1959 to the termination on a number of undisputed grounds of Mr. Kotula's Sales Agreement in 1962. No credible causal relation was shown to exist between these two events. Ford had clear grounds under the Agreement to exercise its right to terminate. The termination was based on those grounds. The District Court and the Court of Appeals considered all the evidence, and each concluded that there was no substantial evidence that the Agreement had been terminated for any other reason. Accordingly, the jury verdict for the plaintiff could not stand. The Court of Appeals was correct in affirming the judgment for Respondent.

2. The decision of the Court of Appeals does not impose a new construction of the Act.

As a second ground for review, the Petitioner urges that the decision of the Court of Appeals has imposed a new construction of the Act by distinguishing the conduct of "local" field personnel from that of corporate officials of an automotive manufacturer.

The decision, however, gives the Act no such construction. The Court of Appeals merely noted the exhaustive review

conducted by the Dealer Policy Board. It observed that the review by the Board had been but one more step in the thorough process leading to Ford's determination that termination for unsatisfactory performance was warranted. Recognition by the Court of Appeals of the role of the Board in this case was simply an affirmation of its conclusion that there was no evidence of a violation of the Act in the termination of Petitioner's Sales Agreement.

CONCLUSION

The law is clear and there is no conflict among the circuits. This case depends upon its own facts, and the decision below was correct. There is no basis for review by this Court. Nor is there any need for this Court to exercise "stewardship" over cases arising under the Act, as suggested by the Petition. If, in fact, no dealer has yet been able to recover under the Act, this simply means that manufacturers have been complying with it, as did the Respondent in this case.

The petition for writ of certiorari should be denied.

Respectfully submitted,

R. J. LEONARD
Attorney for Respondent
1000 First National Bank Building
St. Paul, Minnesota 55101

Of Counsel:
WRIGHT TISDALE
R. B. DARRAGH
J. MICHAEL GUENTHER
FORD MOTOR COMPANY